required to establish for the record that it has taken all reasonable steps to resolve the technological limitations on AIN or other means selective routing.

ISSUE 7: Branding of Services Sold or Information Provided to Customers

AT&T's Position: *AT&T believes branding is a prerequisite for achieving parity and thereby making competition possible so Louisiana consumers can reap the benefits of effective competition. 47 C.F.R. § 51.305(a), 311(b); FCC Order No. 96-325 ¶¶ 244, 313, 970. BellSouth agrees that its service personnel will advise AT&T customers they are acting on AT&T's behalf, and will refrain from marketing BellSouth directly or indirectly to AT&T customers. BellSouth has agreed to require BellSouth personnel to use AT&T designed "leave behind" cards when making a service call on behalf of AT&T. However, AT&T requests that AT&T's "leave behind" cards be of the same quality has that which BellSouth provides itself. AT&T agrees to incur the expense of creating such cards.*

AT&T also contends BellSouth should brand its Operator and Directory Assistance services with the AT&T brand whenever AT&T chooses to have those calls routed to a BellSouth service platform. The Act expressly precludes BellSouth from imposing discriminatory conditions -- such as a refusal to brand resold services --on resale. 47 U.S.C.A. § 251(c)(4)(B). Additionally, the FCC Order requires BellSouth to brand Operator Services/Directory Assistance services for resale unless it is not technically feasible. 47 C.F.R. § 51.613(c); FCC Order No. 96-325 ¶ 971.

BellSouth's Position: *The previous issue involved the "selective routing" question in the context where AT&T resells BellSouth's services using AT&T operators and not BellSouth operators. Issue No. 7 involves the selective routing question in the context where AT&T wants to resell BellSouth's services using BellSouth's operators. In this latter scenario, AT&T has requested that*

BellSouth's operators brand the calls with AT&T's brand. The same technical problems exist with respect to this issue as exist with Issue No. 6, and BellSouth's position on this issue is the same.

AT&T has also requested that when BellSouth personnel communicate with AT&T customers on behalf of AT&T, BellSouth should 1) advise customers they are representing AT&T; 2) provide customer information materials supplied by AT&T; and, 3) refrain from marketing BellSouth directly or indirectly to customers. The parties have resolved this issue with respect to the second and third parts, that is, the leave-behind cards and the statements made by BellSouth representatives when servicing AT&T's customers. The remaining issue involves whether BellSouth personnel must "brand" calls from AT&T's customers. This is the selective routing issue discussed in Issues No. 6.

ANALYSIS AND FINDINGS:

"Branding" is a technically available option only in conjunction with selective routing. At such time as selective routing becomes available (see discussion at Issue 6, supra), BellSouth shall "brand" its services as requested by AT&T. However, until such time, "branding" remains technically infeasible.

ISSUE 8: *This issue was resolved by the parties prior to arbitration*

ISSUE 9: Name/Logo Appearance on Cover of White and Yellow Page Directories

AT&T's Position: *In order to inform Louisiana consumers about the choice they have in local service carriers, AT&T believes BellSouth should have to display the AT&T logo on BellSouth's telephone directories on terms and conditions at parity with those which BellSouth provides itself. This issue is subject to arbitration because BellSouth Advertising and Publishing Company ("BAPCO") is a wholly-owned subsidiary of BellSouth and BellSouth can instruct BAPCO to follow the direction of this Commission. Indeed, BellSouth has used BAPCO in the past to fulfill*

its legal and regulatory obligations. The Louisiana Regulations require that BellSouth (or its affiliates), provide white page directory listings. BellSouth will no doubt look to BAPCO to fulfill BellSouth's legal obligation. Moreover, it is clear that the legal distinction between BAPCO and BellSouth is often blurred. BAPCO admitted during this arbitration proceeding that the telephone number customers must call to obtain new service offerings, billing information, and repair services is the same number customers must call to order new directories. Consequently, it is clear, that BellSouth and BAPCO share resources, assets and/or employees, despite BAPCO's claim to the contrary. BellSouth and BAPCO should not be able to gain a competitive marketing advantage by refusing to allow AT&T equal coverage on the telephone directory if AT&T pays a reasonable price for these services.

BellSouth's Position: *This is a dispute between AT&T and BellSouth Advertising and Publishing Company ("BAPCO") and not between AT&T and BellSouth. AT&T's request does not constitute an obligation imposed upon BellSouth under § 251 or § 252 and is therefore not subject to this arbitration. The resolution of this issue should be negotiated between BAPCO and AT&T.*

BAPCO's Position: *BellSouth Advertising and Publishing Corp. ("BAPCO"), the publisher of the directories at issue, intervened in these proceedings and filed an Exception alleging the lack of subject matter and personal jurisdiction in these proceedings. BAPCO is an affiliate, but not a subsidiary, of BellSouth in the business of publishing directories, including white pages directories and Yellow Pages directories. It is BAPCO and not BellSouth that publishes directories. The issue of whether AT&T's name and logo should appear on directory covers is not subject to resolution in the present arbitration because it does not fall within the scope of compulsory arbitration*

provided by Section 252 of the Federal Telecommunications Act; and as BAPCO is neither a telecommunications carrier nor a local exchange carrier within the meaning of Section 251 and 251 of the Federal Act.

ANALYSIS AND FINDINGS:

The record compiled in this matter establishes that BAPCO and BellSouth are affiliates, both being subsidiaries of their parent holding company, BellSouth Corporation. BAPCO is the sole party responsible for publication of directories, which it then provides to BellSouth for distribution. BAPCO is engaged in no other business than the publication of directories. BellSouth exercises no control over the operations of BAPCO.

As was noted in discussion of Issue 3, BellSouth was under an affirmative obligation to negotiate in good faith the particular terms and conditions of agreements to fulfill *only* those duties of providing interconnection, resale of services or unbundling of network elements, as is specifically enumerated in §251(b)(1-5) and (c)(2-6) of the Act. Likewise, this Commission's jurisdiction in these arbitration proceedings is limited to resolution of issues appearing on that exclusive listing At no point in §251 of the Act, or anywhere in the Act for that matter, does the issue of directory covers appear Such an issue does not even bear a casual relationship to any of the exclusive issues for negotiation (and therefore arbitration) appearing in the Act.

Furthermore, AT&T instituted the underlying arbitration proceedings with BellSouth *Telecommunications, Inc.*, while the directories are published exclusively by BellSouth *Advertising and Publishing Corp.* Although affiliates, each of these parties have separate and distinct corporate identities that must be recognized Simply put, ordering BellSouth (Telecommunications, Inc.) to place AT&T's logo on directory covers would be meaningless, because BellSouth doesn't publish

directories, BAPCO does. Even had AT&T named BAPCO as a party to these proceedings its request would have to be denied, as BAPCO is not subject to this Commission's jurisdiction in conducting the present arbitration. Under the Act, the duty to negotiate is only imposed on incumbent local exchange carriers. See 47 U.S.C. §251(c)(1). This Commission's jurisdiction in the instant proceeding is limited to arbitration of any "open issues" from negotiations between an ILEC and CLEC. See 47 U.S.C. §252(b)(1). In short, BAPCO was not subject to compulsory negotiation under the federal Act, as it is not an ILEC and as the directory cover issue is not among the exclusive enumeration of issues subject to mandatory negotiation and it accordingly cannot be subjected to compulsory arbitration.

As the issue of directory cover logo placement is not properly the subject of arbitration under the federal Act; as BellSouth has no ability to control or direct the placement of names or logos on directory covers, and as BAPCO, the sole party responsible for publication of the directories in question, is not jurisdictionally subject to arbitration under the Act, AT&T's request for an order directing the placement of its name and logo on the directory cover is rejected.

ISSUE 10: *This issue was resolved by the parties prior to arbitration*

ISSUE 11: Advance Notice to Wholesale Customer of Service and Network Changes

AT&T's Position: *In order to compete equally with BellSouth, AT&T must receive notice of changes to services ad network capabilities being relied upon for service to customers from BellSouth before BellSouth implements those changes. This is needed to ensure BellSouth is not given a tactical advantage over the new entrant. Without such notice, BellSouth could undermine the viability of AT&T services by repricing or changing the underlying service before AT&T could adjust its offers.*

BellSouth's Position: *BellSouth will provide notice on new services and changes to existing services when the tariffs are filed at the Commission. Earlier advance notice than the tariff filing could lead to liability or further notice responsibilities as changes are made prior to actual filing date. AT&T and BellSouth have agreed to terms for notification of technology or operational changes that impact AT&T's use of services purchased by AT&T from BellSouth. BellSouth would provide scheduled notices to all carriers concerning network changes that can impact interconnection or network unbundling arrangements. Further, regularly scheduled joint engineering meetings between BellSouth and local providers will provide notice on other technical changes. They only outstanding issue is that AT&T wants BellSouth to provide notice 45 days in advance of the introduction of new services. In this rapidly fluctuating competitive environment, it would be impractical to provide advance notice to the extent AT&T has requested. Additionally, such notice in advance might subject BellSouth to complaints or other obligations should plans for new service introductions not occur as originally noticed.*

BellSouth has proposed an alternative that would allow for a longer notice period. Basically the alternative plan limits BellSouth's liability in the event changes occur after notice is provided and also limits the CLEC's use of this information to operational and billing changes. This alternative has been deemed as acceptable by at least one other potential reseller and should be a reasonable resolution for this issue with AT&T.

ANALYSIS AND FINDINGS:

BellSouth shall advise AT&T at least 45 days in advance of any changes in the terms and conditions under which it offers Telecommunications Services to subscribers who are non-telecommunications carriers including, but not limited to, the introduction or discontinuance of any

feature, function, service or promotion. To the extent that revision occur between the time BellSouth notifies AT&T of the change, BellSouth shall immediately notify AT&T of such revisions consistent with its internal notification process. AT&T will not be allowed to hold BellSouth responsible for any cost incurred by AT&T as a result of such revisions, unless such costs are incurred as a result of BellSouth's intentional misconduct. AT&T is also precluded from utilizing the notice given by BellSouth to market its resold offering of such services in advance of BellSouth.

ISSUE 12: *This issue was resolved by the parties prior to arbitration*

ISSUE 13: *This issue was resolved by the parties prior to arbitration*

ISSUE 14: Access to Unbundled Network Elements

AT&T initially requested BellSouth to unbundle twelve of its network elements. The parties' ongoing negotiations have reduced the number of open issues. Following stipulation entered at by the parties at the beginning of the arbitration hearing, there are only three remaining issues of contention, namely 1) the manner in which AT&T should be given access to the Network Interface Device ("NID"), 2) whether BellSouth can limit AT&T to 'mediated' access to the AIN functionality contained in the unbundled signaling transfer points and service control points and data bases, and 3) whether vertical services are included in the definition of "unbundled Local Switching " Each of these "sub-issues" will be addressed separately

14(A): Network Interface Device ("NID")

AT&T's Position: *BellSouth refuses to allow AT&T to attach its loop wire to a BellSouth NID in those cases where the NID does not have excess capacity. BellSouth claims that such access would create an electrical hazard because this connection would leave its loop without proper grounding. BellSouth's position is baseless and should be rejected for two reasons. First, AT&T*

has set forth the reasonable and safe manner in which it is prepared to connect its wire to the existing NID and has acknowledged the need for safety precautions. Properly trained technicians would ensure that all changes to the NID were consistent with the National Electrical Code. Further, BellSouth's proposal itself poses a danger due to the exposed wires connecting the existing NID to the newly installed NID.

Second, BellSouth's position would negatively impact Louisiana consumers whose NIDs lack excess capacity. Under BellSouth's proposal, these consumers would be forced to have an additional NID attached to the outside of there homes if they chose to take advantage of competition and change local service providers. This inconvenience is unnecessary and would be a disincentive to the development of competition.

BellSouth's Position: *The NID is a single-line termination device or that portion of a multiple-line termination device required to terminate a single line or circuit. The fundamental function of the NID is to establish the official network demarcation point between a company and its end-user customer. The NID, however, also provides a protective ground connection. The FCC concluded in its August 8th Order that it is technically feasible to unbundle the NID; however, the FCC does not require that the CLEC be allowed to terminate its loop directly to BellSouth's NID. BellSouth believes that the NID-to-NID connection described in the FCC's Order is an appropriate arrangement for a CLEC to connect its loop to the inside wire, providing, of course, that the CLEC, in connecting to the inside wire, does not disrupt or disable the BellSouth loop and NID. Alternatively, BellSouth has modified its original position to allow AT&T to connect its loop to any unused terminals in the BellSouth NID.*

ANALYSIS AND FINDINGS:

This issue was extensively addressed in the FCC Order, which expressly rejected AT&T's current position. However, as BellSouth has already stated its willingness to do so, in circumstances where there is an open connections or terminals in BellSouth's NID, AT&T shall be allowed to connect its loops to such open connections or terminals. However, in circumstances where there are no open connections or terminals, AT&T's request to disconnect BellSouth's loop from the NID is inappropriate. In addition to providing the connection between the local exchange carrier's loop and the customer's wiring, the National Electric Code requires that the NID be grounded and bonded via the NID. If BellSouth's loop is disconnected from the NID, it must be re-grounded in some fashion. To allow a third party to disconnect BellSouth's loop from the NID and re-ground it appears to be fraught with potential for damage to BellSouth's loop, particularly when the alternatives are considered. In circumstances where there are no open connections or terminals, AT&T be allowed to effect a NID-to-NID connection as described in the FCC Order, at ¶¶392 - 394.

14(B): <u>AIN Capabilities (Signaling Link Transport Signaling Transfer) Points (STP) and Service Control Points (SCP) and Databases</u>

AT&T's Position: *BellSouth refuses to unbundle access to its signaling network elements in such a way that AT&T can achieve parity in the creation and offering of Advanced Intelligent Network ("AIN") based services. BellSouth seeks to provide AT&T access to BellSouth's network via a mediation device which BellSouth claims is necessary to ensure the security and integrity of the network.*

The Commission should order BellSouth to provide unmediated access to the AIN for three reasons. First, introduction of the type of mediation that BellSouth is proposing will directly affect

Louisiana consumers by increasing post-dial delay by an estimated 20% over that of a similar AIN call made by a BellSouth customer. The increased post dial delay thus creates a difference between the service offered by BellSouth and the service that new entrants will be able to provide their customers. In order for robust competition in the local telephone exchange market to develop quickly in Louisiana, new entrants must be able to offer potential customers service that meets or exceeds comparable service provided by BellSouth. While the post dial delay increment may be small, and may even, as BellSouth has suggested, be barely perceptible to a customer, the mere existence of the difference in the quality of the service provided by AT&T and BellSouth could be exploited by BellSouth to its advantage. As demonstrated by the excerpt from the BellSouth Internet website page used in the cross examination of Mr. Varner at the hearing, BellSouth can and will take strategic advantage of any disparity, real or perceived, between its service and the service of new entrants. Such a result will disadvantage the new entrant's ability to attract customers and thereby severely inhibit the growth of competition in Louisiana.

Second, introduction of a mediation device into the signaling network will insert additional points of potential network failure, as well as increasing the cost and time of implementing services to customers. As detailed in the direct testimony of AT&T witness Mr. Hamman, existing safeguards within the signaling network already provide the necessary protection against traffic overload and unauthorized access. Further, recent industry trials and tests of AIN capabilities demonstrate that mediated access to the AIN is unnecessary.

Third, allowing BellSouth to utilize the mediation device would contravene the Louisiana Commission's own order that local exchange carriers must provide access to each other's databases, including AIN, "through signaling interconnection with functionality, quality, terms, and conditions

equal to that provided to the [local exchange carrier] and its affiliates." LPSC Reg. § 901(L)(3).

Should this Commission conclude that mediation is necessary, BellSouth must also be required to route its traffic through such mediation. The LPSC § 901(L)(3) requires that access to databases, including AIN, be "equal " to that which the LEC provides itself. Consequently, all carriers should route traffic through the mediation device. Additionally, requiring BellSouth to also route its traffic through the mediation device, encourages BellSouth to cooperate with AT&T to create a device that is less noticeable to all customers by putting all on a level playing field.

BellSouth's Position: *BellSouth has agreed to give AT&T access to BellSouth's AIN capabilities. In order to prevent both intentional and unintentional disruption of its network, BellSouth proposes that computer software referred to as "mediation" devices be put into place. BellSouth has agreed, should AT&T believe that it needs similar protection from any BellSouth's AIN database connected to AT&T's network, to allow AT&T use of similar mediation devices.*

BellSouth believes that two types of mediation are required to protect its network from intentional or unintentional disruption. The first is mediation required between a third party's (such as AT&T's) Service Control Point ("SCP") and BellSouth's Signal Transfer Points ("STPs"). BellSouth believes it has a right to protect its network. Even with the development of new AIN functionality, a mechanism for mediation is required to prevent intentional or unintentional disruption of BellSouth's AIN network by a CLEC. In his pre-filed testimony, Mr. Hamman pointed to a joint report on testing conducted by AT&T and BellSouth on the subject of AIN interconnection. One need simply read from the first page of BellSouth's portion of that joint report to understand why such un-mediated access should not be allowed. The first page of that report includes the following two sentences:

> *Testing conducted between AT&T and BellSouth focused exclusively on the call processing aspects of the MMB service and did not address more global and complex AIN interconnection issues such as billing, operations, administration, maintenance or provisioning.... As verified during the Interconnection Test, this architectural proposal fails to address a significant number of concerns in a manner that would meet the following network requirements...*

See AT&T - BellSouth AIN Test Report (BellSouth Individual Report), attached as Exhibit 1 to Pre-filed Direct Testimony of J. Hamman.

Mr. Hamman also suggests that post dialing delay (that is, the time between the completion of dialing and proper disposition of the call (ringing tone, announcement, busy tone, etc.) is an additional factor in requiring un-mediated access. Unfortunately Mr. Hamman did not note that AT&T and BellSouth differ significantly in their projections of the amount of additional post dialing delay introduced by mediation devices and further, whether such post dialing delay is even discernible to the customer making the call. At the hearing, Mr. Hamman testified that, in his opinion, a post-dialing delay of 8/10 of a second was perceptible to customers. See Hearing Transcript, Vol. 1, at p. 137, ll. 19-21. BellSouth submits that 8/10 of a second is not perceptible, and a small price to pay for network reliability.

The second form of mediation that BellSouth believes is appropriate is intended to protect the contents of BellSouth's call related databases. If third parties are allowed direct access to those databases, BellSouth believes disruption is possible from third parties who wish to either update the contents of those databases or to create new service logic stored in those databases that would instruct BellSouth switches how to process and route certain calls.

ANALYSIS AND FINDINGS:

BellSouth has already agreed to give AT&T access to its AIN capabilities The question presented in this issue is whether access to these capabilities will be "mediated." AT&T's concern with mediation is two-fold. First, the introduction of mediation into the network is an additional point of potential system failure and, secondly, that mediation would add a post-dialing delay of between 1/10 and 8/10 seconds (the BellSouth and AT&T witnesses differed on the actual amount of post-dial delay). This question was the subject of a great amount of discussion in the FCC Order, at §V(J)(4), which provides in pertinent part:

> Although we conclude that access to incumbent AIN SCPs is technically feasible, we agree with BellSouth that such access may present the need for mediation mechanisms to, among other things, protect data in incumbent AIN SCPs and ensure against excessive traffic volumes In addition, there may be mediation issues a competing carrier will need to address before requesting such access. Accordingly, if parties are unable to agree to appropriate mediation mechanisms through negotiations, we conclude that during arbitration of such issues the states (or the Commission acting pursuant to section 252(e)(5)) must consider whether such mediation mechanisms will be available and will adequately protect against intentional or unintentional misuse of the incumbent's AIN facilities. (Emphasis added) *Id.*, at ¶488.

In short, AT&T's request for unmediated access to the AIN is inappropriate, and the appropriate question for this arbitration proceeding is simply whether mediation mechanisms are available and whether they will adequately protect against intentional or unintentional misuse of BellSouth's AIN facilities. The record in this matter establishes that mediation protocols are currently technically feasible, and BellSouth has stated for the record that it deems such mediation sufficient to protect its facilities AT&T's alternative assertion that should this Commission conclude that mediation is necessary BellSouth must also be required to route its traffic through such mediation is also rejected. Although the introduction of mediation admittedly introduces a post-dialing delay, AT&T's position

that the Act's requirement of "parity" mandates that all parties have comparable delays is unsupportable. The Act, at §251(a)(3), describes dialing parity as access with "no *unreasonable* delays." As the FCC has already required mediation when technically feasible and resultant post-dialing delays must be deemed "reasonable" and therefore at parity. Accordingly, BellSouth is ordered to provide AT&T with access to its AIN facilities, but only subject to mediation.

14(C) **Local Switching:**

AT&T's Position: *BellSouth refuses to unbundle Local Switching that includes all the features, functions, and capabilities inherent in BellSouth's switches, but does not include the separate and distinct network elements of operator systems and inter-office transport. BellSouth's second "justification" for refusing to provide Local Switching as requested by AT&T is that customized routing is not technically feasible. Also, BellSouth claims it cannot unbundle Operator Systems, Tandem Switching, Dedicated and Common Transport based upon its argument that customized routing is not technically feasible.*

BellSouth's Position: *AT&T has requested that the local switching capability and operator systems be made available as unbundled network elements and as separate elements of total service resale. What these parties define as "local switching" and "operator systems" are more appropriately referred to as "selective routing" or "customized routing." Essentially, AT&T wants BellSouth to provide selective routing arrangements that will enable an end-user (for which a CLEC acquires service from BellSouth at wholesale and resells at retail) to reach a CLEC's operators just as a BellSouth customer reaches a BellSouth operator or repair service center today when dialing 0, 411 or 611. AT&T has defined two other unbundled network elements (dedicated transport and common transport) as requiring the selective routing capability.*

BellSouth will resell its retail services and offer all capabilities (operator and directory services, dedicated transport and common transport) on an unbundled basis; however, when a CLEC resells BellSouth's services or otherwise utilizes BellSouth's local switching it is not technically feasible to selectively route calls to CLEC operator service or repair service platforms on a non-discriminatory basis to all CLECs who may desire this feature.

ANALYSIS AND FINDINGS:

As in issues 6 and 7, supra, resolution of this issue hinges on whether "selective routing" is technically feasible. The Commission would simply adopt and reaver the resolution of this question as presented in analysis of Issue 6- that selective routing is not technically feasible- and deny AT&T's request that local switching capability and operator systems be made available as unbundled network elements

ISSUE 15: Limitations on Combining Unbundled Network Elements

AT&T Position: *BellSouth may not place any restrictions on AT&T's ability to combine unbundled network elements with one another, with resold services, or with AT&T's or a third party's facilities. The Act expressly requires BellSouth to "provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." 47 U.S.C.A. § 251(c)(3). The FCC specifically found that a new entrant may combine unbundled network elements in any manner it chooses. 47 C.F.R. §§ 51.309(a) and 51.315(c); FCC Order No. 96-325 ¶¶ 292, 296. Notwithstanding these clear legal requirements, BellSouth refuses to provide AT&T with the unbundled Loop Facility and unbundled Local Switching if AT&T plans to combine them and offer service to consumers using these elements. Instead, BellSouth maintains that AT&T's only "choice" is to buy BellSouth's existing port*

offering at a wholesale price and then resell it to AT&T's customers. AT&T contends BellSouth must provide access to the unbundled network elements which AT&T has requested. Unbundling refers to the offering of discrete elements of the incumbent LEC's network as generic functionalities rather than as retail services. Once a network element has been unbundled from the local exchange network, it can be combined with other elements in such a way as to provide service offerings. The network elements must be unbundled so that AT&T can combine these ingredients to create for consumers the widest variety of service options, including services not available from BellSouth.

Each of the elements requested meet the definition of a network element as "a facility or equipment used in the provision of a telecommunications service" including the "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." 47 U.S.C.A. § 153(29). AT&T believes the Act requires that BellSouth provide access to network elements at any technically feasible point. 47 U.S.C.A. § 251(c)(3). Technical feasibility under the Act refers solely to technical or operational concerns and not economic, space or site considerations. 47 C.F.R. § 51.5; FCC Order No. 96-325 ¶ 198. Provision of all of the elements requested is technically feasible.

The ability to combine the unbundled Local Loop and unbundled Local Switching allows new entrants to create a "platform configuration," whereby the new entrant combines an unbundled switch and an unbundled loop to form a basic exchange platform for local exchange services. The new entrant can then market this basic platform, or combine it with its own network elements, such as Operator and Directory Assistance services. The use of the platform by a new entrant allows for

lower prices and ease of shifting between providers; does not require reconfiguration for a change in providers; and solves the problem of local number portability. New entrants will not choose to purchase unbundled elements to recreate a service available for resale simply to avoid paying wholesale rates. Re-creation and marketing of services using unbundled network elements requires skills and expertise that many new entrants do not possess and involves increased risks over purchasing services for resale.

BellSouth's Position: *For purposes of this proceeding, BellSouth does not ask the Commission to rule on the issue of whether AT&T can recombine network elements to recreate BellSouth's existing services. That is an issue before the Eighth Circuit Court of Appeals. BellSouth requests the Commission to address the appropriate pricing for such recombinations. BellSouth respectfully requests this Commission to conclude that under the Act, when a new entrant such as AT&T simply purchases and combines underlying unbundled network elements to create a service substantially identical to that which BellSouth is already offering at retail (especially in the case of unbundled local loop and unbundled local switching), the parties should treat that transaction for what it is, the resale of a service, rather than the combination of unbundled elements, and for pricing purposes, the new entrants should pay the discounted wholesale rate applicable to resold services.*

AT&T's interpretation of the Act will give AT&T (1) the ability to resell BellSouth's retail services, but avoid the Act's pricing standard for resale; (2) the ability for AT&T to avoid the joint marketing restriction specified in the Act, as well as any use and user restrictions contained in BellSouth's tariffs' (3) the ability to argue for the retention of access charges by AT&T even though the actual arrangement is "disguised resale"; (4) the ability to maximize its market position by

gaming the system and targeting the most profitable form of resale to particular customers (i.e., resale in rural areas, and rebundled services in urban areas); and, (5) the ability to foreclose, to a large extent, facilities-based competition and competitors. Moreover, AT&T would be able to do all of this without investing the first dollar in new facilities or new capabilities.

ANALYSIS AND FINDINGS:

AT&T requested that this Commission impose no restrictions on AT&T's ability to combine BellSouth's network elements in AT&T's providing of local service. The FCC rules clearly provide that an ILEC shall provide network elements in a manner that allows requesting CLEC's to combine such network elements in order to provide a telecommunications service. In addition, the FCC rules provide that upon request an ILEC shall perform the functions necessary to combine unbundled network elements with elements possessed by the CLEC in any technically feasible manner.

However, the federal Act establishes separate and distinct pricing methodologies for resold services and for unbundled network elements. Specifically, the Act mandates that wholesale rates shall be determined on the basis of retail rates charged to subscribers, excluding the costs avoided by the local exchange carrier (§252(d)(3)). Each ILEC has the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers (§252(d)(4)). However, with respect to interconnection and network elements, the Act specifies that the charges shall be based on cost and may include a reasonable profit (§252(d)(1)(A)). Further, the Act places a restriction on the ability of certain telecommunications carriers to jointly market resold services with interLATA services (§271(e)(1)).

Clearly, all relevant portions of the Act and the FCC Order provide that AT&T may purchase unbundled elements from BellSouth and rebundle those elements in any manner that is technically

feasible. This fact is undisputed by either party. The real issue presented is not whether AT&T may purchase and rebundle elements in any manner they choose, but the rate of compensation for the purchase of such 'elements.'

To the extent AT&T purchases unbundled network elements and then recombines them to replicate BellSouth services, it is reselling BellSouth's services. As Shakespeare pointed out, a rose by any other name is still a rose, and so it is with resale, even when AT&T chooses to call it a combination of unbundled elements. Both the FCC and this Commission have issued Orders strongly supporting an aggressive resale market. This commitment to resale would be rendered meaningless if AT&T were allowed bypass resale through the fiction of "rebundling." Unrestricted pricing on the recombination of unbundled elements would allow AT&T to purchase unbundled elements from BellSouth and then rebundle those elements without adding any additional capability, in order to create a service which is identical to a retail offering already being provided by BellSouth and therefore subject to mandatory resale. Such an arrangement would allow AT&T to avoid both the Act's and this Commission's pricing standards for resale, avoid the Act's restrictions regarding joint marketing and avoid access charge requirements. Such an arrangement would also serve as a disincentive to the ILECs to construct their own facilities.

Accordingly, AT&T may combine unbundled network elements in any manner they choose; however, when AT&T recombines unbundled elements to create services identical to BellSouth's retail offerings, the prices charged to AT&T for the rebundled services shall be computed at BellSouth's retail price less the wholesale discount established in Order U-22020 or any subsequent modifications thereof (the current resale discount rate is 20.7%) and offered under the same terms

and condition as BellSouth offers the service under.[5] AT&T will be deemed to be "recombining unbundled elements to create services identical to BellSouth's retail offerings" when the service offered by AT&T contain the functions, features and attributes of a retail offering that is the subject of properly filed and approved BellSouth tariff. Services offered by AT&T shall not be considered "identical" when AT&T utilizes its own switching or other substantive functionality or capability in combination with unbundled elements in order to produce a service offering. For example, AT&T's provisioning of purely ancillary functions or capabilities, such as operator services, Caller ID, Call Waiting, etc., in combination with unbundled elements shall not constitute a "substantive functionality or capability" for purposes of determining whether AT&T is providing 'services identical to a BellSouth retail offering.'

ISSUE 16: Access to Rights-of-Way, Poles, Ducts, and Conduits

AT&T's Position: *BellSouth must provide AT&T access to rights-of-way, conduit, pole attachments, and any other pathways on terms and conditions at parity to that provided by BellSouth to itself or any other party. BellSouth has backed off of its original demand for reservation of capacity up to five years in advance, but has offered no alternative demand. It has indicated that it would not grant even one year of reserved space to AT&T.*

AT&T's position is that BellSouth should not be permitted to reserve for itself capacity in a given facility unless other carriers are permitted to reserve capacity for an equal number of years because the Act requires BellSouth to provide nondiscriminatory access to other providers. 47 U.S.C.A. § 251(c)(2) and (6). The FCC Order also explicitly prohibits BellSouth from reserving right-of-way capacity for its future needs at the expense of the needs of new entrants. FCC Order

[5]See discussion at Issue 2, supra.

No. 96-325 ¶ 1170. "Nondiscriminatory" means that BellSouth must provide to others the same access it provides to itself.

BellSouth's Position: *BellSouth agrees to provide AT&T equal and non-discriminatory access to poles, duct, conduit (excluding maintenance spares), entrance facilities, and rights of way under its control, which are not currently in use and not required by BellSouth as a maintenance spare. The equal and non-discriminatory access shall be on terms and conditions equal to that provided by BellSouth to itself or to any other party, except that BellSouth should not be required to give access to its maintenance spares. BellSouth's reservation of maintenance spares is a standard telecommunications industry practice. A maintenance spare is simply a place reserved on the pole or in the conduit in which BellSouth can place facilities quickly in response to emergency situations such as cut or destroyed cables. Extensive delays in service restoration will be experienced if BellSouth's maintenance spare is forfeited.*

BellSouth's original position sought to reserve conduit and pole capacity required by BellSouth's five-year forecast. However, the FCC Order apparently concluded that an incumbent LEC may not reserve space in its conduit or on its poles for its own use different from what it would allow a CLEC to reserve. If the FCC Order on this issue withstands appeal, BellSouth will face the conundrum of either allocating conduit and pole space on a first come, first served basis or allowing parties to reserve capacity no matter the timeframe. BellSouth cannot efficiently and effectively provide service under either scenario for the reasons stated by Mr. Milner. Nevertheless, in an effort to resolve this issue, BellSouth proposes that no space be reserved by any party and that available space be allocated on a "first come, first serve" basis. BellSouth does request that its emergency spares, which are used during emergency restoration activities, be

excluded from allocation. Further, terms and conditions of such access shall not include the mandatory conveyance of BellSouth's interest in real property involving third parties.

ANALYSIS AND FINDINGS:

This issue is readily resolved through reference to the Act, which requires unbundled access to rights-of-way, and previous Orders of this Commission. Pole attachments are addressed in this Commission's General Order dated December 17, 1984. This Order was recently reaffirmed in the General Order dated March 15, 1996. This latter Order, entitled "Regulations for Competition in the Local Telecommunications Market," provides at §1101(K) that Telecommunications Service Providers shall allow nondiscriminatory access to their conduits and rights-of-way by other Telecommunications Service Providers for the provisioning of local telecommunications services."

Allowance of reservation of pole/conduit/right-of-way capacity- finite resources- will inevitably lead to strategic posturing by parties and would appear to be at direct odds with this Commission and the Acts requirement of non-discriminatory access. The sole exception to this would be the "maintenance space" noted by BellSouth, which is found to be a technical necessity.

Although BellSouth may reserve unto itself a "maintenance spare," all other pole capacity shall be allocated on a first come/first serve basis.

ISSUE 17: *This issue was resolved by the parties prior to arbitration*

ISSUE 18: *This issue was resolved by the parties prior to arbitration*

ISSUE 19: Access to Unused Transmission Media

AT&T's Position: *BellSouth must lease to AT&T its unused transmission media also known as "dark fiber." AT&T believes that dark fiber meets the Act's definition of a network element. 47 U.S.C.A. § 153(29). The fact that it is not currently in use does change its nature. AT&T will*

deploy SONET rings in certain market areas to create competitive facilities. Building these rings will require the placement of many miles of fiber, with the attendant difficulties of obtaining rights-of-way, conduit and pole, and building permits. Access to BellSouth's dark fiber will permit AT&T to develop its own network facilities more quickly because it can put to good use an existing but unutilized element in BellSouth's network and will not need to lay its own fiber and obtain rights-of-way, conduit, poles and building permits.

BellSouth's Position: *The "dark fiber" to which AT&T seeks access is, by definition, unused by BellSouth, and does not form part of BellSouth's functioning network. Accordingly, it should not be considered a "network element" subject to unbundling under the Act.*

ANALYSIS AND FINDINGS:

Section 251(c)(3) of the Act imposes a duty on incumbent LECs to "provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." The Act, at §153(a)(45) defines 'network element' as "a facility or equipment used in the provision of a telecommunications service." As noted by BellSouth, unused transmission media is by definition not used, and therefore it is not a "network element." BellSouth's unused transmission media is therefore not subject to mandatory unbundling under the Act

ISSUE 20: *This issue was resolved by the parties prior to arbitration*

ISSUE 21: Provision of Copies of Records Regarding Rights-of-Way

AT&T's Position: *BellSouth must provide AT&T with copies of pole and conduit engineering records. The FCC Order indicates an expectation that BellSouth will make its maps, plats and other relevant data available for inspection and copying when BellSouth receives a*

legitimate request for access to its facilities or property. FCC Order 96-325 ¶ 1223: Copies of these records are required to facilitate AT&T's planning of access to facilities which in turn is necessary to provide service to Louisiana consumers. AT&T agrees that appropriate conditions can be imposed to protect proprietary data.

BellSouth's Position: *BellSouth's engineering records for rights of way are extremely proprietary. BellSouth has agreed to provide AT&T with structure occupancy information regarding conduits, poles, and other right-of-way requested by them within a reasonable time frame. BellSouth will allow designated CLEC personnel, or agents acting on behalf of a CLEC, to examine engineering records or drawings pertaining to such requests that BellSouth determines would be reasonably necessary to complete the job. In negotiations, AT&T has said it has been satisfied with BellSouth's coordination and cooperation on structure access situations. Additionally, in negotiations AT&T said that it would not be willing to give BellSouth copies of its plats in a reverse situation. Plats and detailed engineering records are considered proprietary information and the FCC Order accords BellSouth reasonable protection of its proprietary information contained in records provided to AT&T.*

ANALYSIS AND FINDINGS:

As was noted in discussion of Issue 16, supra, this Commission already has rules and regulations in place requiring non-discriminatory access to rights-of-ways. This requirement would be meaningless without access to the requested records. Nevertheless, BellSouth is correct in its assertion that many of these records might contain confidential or proprietary information. BellSouth shall make the requested records available, subject to the execution of a mutually acceptable confidentiality agreement

ISSUE 22: *This issue was withdrawn from arbitration by AT&T*

ISSUE 23: *This issue was withdrawn from arbitration by AT&T*

ISSUE 24: **What is the appropriate price for each unbundled network element that AT&T has requested?**

AT&T's Position: *AT&T proposes that the Commission set unbundled network element prices at the costs generated by AT&T's proposed Hatfield Model rates. Each of the prices recommended by AT&T represent BellSouth's TELRIC, plus a reasonable share of joint and common costs. AT&T further contends that the Commission should adopt the AT&T proposed operator systems prices based on BellSouth cost data until BellSouth produces cost data sufficient to permit a more detailed analysis.*

BellSouth's Position: *BellSouth recommends as rates for unbundled network elements the BellSouth's existing tariffed rates for services that are comparable to the unbundled network elements, where they exist, because those existing tariff rates are based upon BellSouth's costs, have been approved by this Commission, include a reasonable profit, and, therefore, meet the requirements of § 252 of the Act. For unbundled network elements where there are no existing tariff rates, BellSouth proposed market-based rates that are subject to a true-up process within the next six months. BellSouth's proposed rates are set forth in Scheye Exhibit RCS-2. BellSouth and ACSI used this approach in its recently negotiated settlement, in which the parties agreed on rates for the elements that ACSI needed to get into business, and made the agreed-upon market rates subject to a true-up process after the relevant regulatory bodies determined final prices through a generic cost proceeding. As long as the prices here are set on a reasonable basis (which does not mean the FCC proxy rates or rates derived from the Hatfield Model) and as long as there is a true-up provision*